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No. _____

In The

# Supreme Court of the United States

JAMES D. McCALL; STANLEY R. COLLINS; E. E. BOWMAN; J. WILLIAM HUFF; MICHAEL N. DANA; O. J. NORMAN; MURL C. LINKE; JOSEPH R. ROBERTS; LAWRENCE S. KISER; NORMAN D. BREHM; WILLIAM S. BRANCH; JEROME P. O'CONNOR; WILLIAM T. DAVIDSON; BART A. WIESLEY; W. H. TICEN; BETTY TITCHENER, executrix of Gerald Titchener's estate; and GEORGE D. STARIHA,

*Petitioners,*

v.

BURLINGTON NORTHERN/SANTA FE COMPANY f/k/a Burlington Northern Railroad Co.; BURLINGTON NORTHERN RAILROAD COMPANY 1991 SEPARATION PAY PLAN; TRUSTEES OF THE BURLINGTON NORTHERN RAILROAD COMPANY 1991 SEPARATION PAY PLAN; TRUSTEES OF THE BURLINGTON NORTHERN RAILROAD COMPANY 1995 VOLUNTARY SEPARATION PLAN; BURLINGTON NORTHERN, INC. PENSION PLAN; TRUSTEES OF THE BURLINGTON NORTHERN, INC. PENSION PLAN; BURLINGTON NORTHERN THRIFT AND PROFIT SHARING PLAN; TRUSTEES OF THE BURLINGTON NORTHERN THRIFT AND PROFIT SHARING PLAN; ALAN W. SPEAKER; JEANNE MICHALSKI; and DONALD SCOTT,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

DAVID B. SESERMAN
*Counsel of Record*
TIMOTHY J. PARSONS
DEAN C. HEIZER
GORSUCH KIRGIS LLP
Tower I, Suite 1000
1515 Arapahoe Street
Denver, Colorado 80202
303/376-5000

ERIC W. PINKER
LYNN TILLOTSON & PINKER L.L.P.
750 N. St. Paul Street
Suite 400
Dallas, Texas 75201
214/981-3800

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## QUESTIONS PRESENTED

1. Whether fiduciaries of ERISA separation pay plans may repudiate with impunity clear and unambiguous promises about future benefits made in summary plan descriptions which were intended to and did invoke the reliance of the plan participants.

## LIST OF PARTIES

The caption of the case includes the names of all parties.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, which found that ERISA fiduciaries may repudiate with impunity promises about future benefits that were made in a summary plan description, and which were intended to and did invoke the reliance of plan participants.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 237 F.3d 506 (5th Cir. 2000), and is reprinted in the appendix at App. 1.

The decision of the United States District Court for the Northern District of Texas is reported at 61 F. Supp.2d 563 (N.D. Tex. 1999), and is reprinted in the appendix at App. 17.

## JURISDICTION

The Fifth Circuit Court of Appeals entered judgment against the petitioners on December 26, 2000. Petitioners' request for rehearing was denied on March 12, 2001.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS INVOLVED

*29 U.S.C. § 1001 et seq. Employee Retirement Income Security Act of 1974, as amended.*

The relevant portions of ERISA will be addressed throughout the Petition.

*29 U.S.C. § 1002(21)(A)*

The relevant portion of this statute is as follows:

> **(21)(A)** Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent . . . (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. . . .

*29 U.S.C. § 1104(a)*

The relevant portion of this statute is as follows:

> **(a) Prudent man standard of care**
>
> **(1)** Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
>
> > **(A)** for the exclusive purpose of
> >
> > **(i)** providing benefits to participants and their beneficiaries; and
> >
> > **(ii)** defraying reasonable expenses of administering the plan;
> >
> > **(B)** with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters

would use in the conduct of an enterprise of a like character and with like aims;

* * *

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

*29 U.S.C. § 1132(a)*

The relevant portion of this statute is as follows:

**(a) Persons empowered to bring a civil action.**

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section; or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan; . . .

*29 C.F.R. § 2520.102*

The relevant portions of this regulation will be addressed throughout the Petition.

*29 C.F.R. § 2520.102-2(b)*

The format of the summary plan description must not have the effect of misleading, misinforming or failing to inform participants and beneficiaries. Any description of exceptions, limitations, reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant. Such exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits. The advantages and disadvantages of the plan shall be presented without either exaggerating the benefits or minimizing the limitations. The description or summary of restrictive plan provisions need not be disclosed in the summary plan description in close conjunction with the description or summary of benefits, provided that adjacent to the benefit description the page on which the restrictions are described is noted.

## STATEMENT OF THE CASE

The Petitioners are career employees of Burlington Northern Railroad and its predecessors ("BN") who accepted the terms of a 1991 separation pay plan called the Burlington Northern Railroad Separation Pay Plan

(the "1991 Plan").[1] *McCall v. Burlington Northern/Santa Fe Co.*, 237 F.3d 506, 510 (5th Cir. 2000). In deciding to accept the terms of the 1991 Plan, and resign from employment with BN, the Petitioners relied on written statements prepared by BN that were contained in the 1991 Plan's Summary Plan Description ("SPD"). This 1991 SPD included the following question and answer:

> Q. Will there be another opportunity to participate in a separation pay plan after this one?
>
> A. The company is offering this plan in an effort to reduce its expenses due to business conditions. At this time, the company's management has not yet decided if there will be any additional voluntary separation plans. **However, management has decided that if there are any additional plans, the benefits would not be as good as those contained in this plan.**

*Id.* (the "No Better Benefits Q&A") (emphasis added). Because it was included within the 1991 SPD, and because it addressed BN's position with regard to future employee benefits, the No Better Benefits Q&A was a fiduciary communication.

BN included the No Better Benefits Q&A in the written SPD to induce the plan beneficiaries, including Petitioners, to resign from their jobs with BN. *See McCall*, 237 F.3d at 509-510. Petitioners relied on this provision and would not have resigned from their jobs without the assurance that any additional voluntary separation pay

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[1] For the purpose of this Petition for Writ of Certiorari, all Respondents will be jointly referred to as "BN."

plan would not provide better benefits than those described in the 1991 SPD. Thus, Petitioners would have remained employed at BN had the No Better Benefits Q&A not been included in the 1991 SPD.

Contrary to BN's promise that the benefits "would not be as good" in any later plan, BN adopted a voluntary separation pay plan in 1995 (the "1995 Plan") that provided significantly better benefits than those in the 1991 Plan. *McCall*, 237 F.3d at 510. Had they remained BN employees, Petitioners would have been eligible to participate in the 1995 Plan.

Petitioners asserted several causes of action in the United States District Court for the Northern District of Texas against BN under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 *et seq.* and under the federal common law of ERISA. Specifically, Petitioners alleged, *inter alia*, that BN breached its fiduciary duties by repudiating the no better benefits promise that it placed in the 1991 SPD, and by negligently or intentionally misrepresenting the fact that management had decided that no better benefits would be provided in subsequent separation plans. *McCall v. Burlington Northern/Santa Fe Co.*, 61 F. Supp.2d 563, 566 (N.D. Tex. 1999).

After completing discovery, both parties filed motions for summary judgment. The district court ruled in favor of BN, and entered judgment in favor of BN. In its Opinion, the district court held that Petitioners could not prevail on their claims against BN because the critical statements in the No Better Benefits Q&A were truthful when made. *Id.* at 569-70. As a result of these holdings,

the district court effectively approved BN's conduct in making a promise to Petitioners while they were plan fiduciaries, then repudiating that promise after Petitioners resigned in reliance on the very promise in question.

Following the district court's ruling, Petitioners appealed to the United States Court of Appeals for the Fifth Circuit. In discussing Petitioners' claim for benefits under the 1995 Plan, the Fifth Circuit recognized that statements in summary plan descriptions are binding, and "if there is a conflict between the SPD and the terms of the plan itself, the SPD controls." *McCall*, 237 F.2d at 512. The Fifth Circuit also acknowledged that "any ambiguities in the SPD must be resolved in the employee's favor . . . [and] . . . the SPD must be read as a whole." *Id.* Nevertheless, the Fifth Circuit ruled in favor of BN and affirmed the district court's judgment. *Id.* at 514.

In its Opinion, the Fifth Circuit acknowledged that BN made a promise to Petitioners that the benefits provided by any future plan would not be as good as those provided in the 1991 Plan. *Id.* at 510. But, the Fifth Circuit held that Petitioners were not entitled to relief because the plan was silent regarding a remedy for breach of this promise. *Id.* at 512-513. In essence, the court held that the only way Petitioners would be eligible for better benefits under the 1995 Plan would be if the plan documents contained a remedy for the breach of the promise that no future plans would have better benefits, such as "if a better plan is provided in the future, you will be able to receive the better benefits." *Id.* at 513. The Fifth Circuit also supported its holding by noting that the 1991 Plan documents contained a provision that enabled BN to

amend or terminate the plan at any time. *Id.* However, it is undisputed that the 1991 Plan was never amended.

In his dissent, Judge Kazen rebutted the key conclusions reached by the majority. In particular, Judge Kazen correctly stated that "[t]he instant case does not involve silence but rather a clear and unambiguous statement, namely that no future plan would have better benefits." *Id.* at 515. Similarly, in responding to the argument that the SPD provided no explicit remedy for Petitioners, Judge Kazen recognized that the remedy for BN's breach of its no better benefits promise was contained within ERISA at 29 U.S.C. § 1132(a). *Id.* Finally, Judge Kazen also responded in opposition to the argument that BN was permitted to change or alter its plans, stating:

> [Petitioners] do not dispute Burlington Northern's right to amend the 1991 Plan, but Burlington Northern never attempted to exercise that right. Moreover, the [Petitioners] do not contend that Burlington Northern could never again design a voluntary separation plan. . . . What is at issue is a positive, unequivocal statement that "management has decided that if there are any additional plans, the benefits would not be as good as those contained in this plan."

*Id.*

The Petitioners timely filed a Petition for Rehearing, which the Court denied on March 12, 2001. The Petitioners have duly filed their Petition for Writ of Certiorari within ninety days of the entry of this ruling.

## REASONS FOR GRANTING THE WRIT

The opinion of the Fifth Circuit deprives plan participants and beneficiaries of the protections afforded by ERISA and encourages plan fiduciaries to make and then (after inducing reliance) repudiate explicit written promises about future plan benefits. In so holding, the Fifth Circuit's Opinion is contrary to the decisions of every circuit (including the Fifth Circuit) that have addressed the binding nature of statements made in a summary plan description. If allowed to stand, the Fifth Circuit's ruling invites future plan administrators and fiduciaries to make clear and unambiguous promises to plan participants about future benefits in an effort to induce reliance, then repudiate those promises with impunity.

### I. BN BREACHED FIDUCIARY DUTIES BY ADOPTING A PLAN TO WHICH IT DID NOT INTEND TO BE BOUND, AND REPUDIATING A CLEAR AND UNAMBIGUOUS PROMISE CONTAINED IN AN ERISA PLAN.

"Congress enacted ERISA . . . to protect working men and women from abuses in the administration and investment of private retirement plans and employee welfare plans." *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 976 (5th Cir. 1991) (quoting *Donovan v. Dillingham*, 688 F.2d 1367, 1370 (11th Cir. 1982) (*en banc*)). This overarching purpose has lead to four fundamental principles that are relevant to this case:

1. "summary plan description [must] be 'accurate' and 'sufficiently comprehensive to apprise' plan participants of their rights and obligations under the plan." *Hansen*, 940

F.2d at 981 (citing 29 U.S.C. § 1022); *see Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995) (discussing same);

2. "clear and unambiguous statements in the summary plan description are binding." *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 938 (5th Cir. 1993);

3. "[any] ambiguity in [a] summary plan description must be resolved in favor of the employee and made binding against the drafter." *Hansen*, 940 F.2d at 982; *Ramsey v. Colonial Life Ins. Co. of America*, 12 F.3d 472, 479 (5th Cir. 1994) ("[T]his circuit follows the *contra preferentum* rule of contract interpretation in the ERISA context." Such a rule "mandate[s] that we adopt the most pro-beneficiary interpretation."); and

4. "[c]onveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation," are fiduciary communications. *Varity Corp. v. Howe*, 516 U.S. 489, 502-503 (1996).

As the Fifth Circuit explained, these requirements are an inherent part of ERISA's statutory scheme:

> Any burden of uncertainty created by careless or inaccurate drafting of the summary **must be placed on those who do the drafting, and who are most able to bear that burden, and not on the individual employee, who is powerless to affect the drafting of the summary** . . . and ill equipped to bear the financial hardship that might result from a misleading or confusing document. Accuracy is not a lot to ask. And it is especially not a lot to ask in return for the

> protection afforded by ERISA's preemption of state law causes of action – causes of action which threaten considerably greater liability than that allowed by ERISA.

*Wise*, 986 F.2d at 939 (quoting *Hansen*, 940 F.2d at 981-82) (emphasis supplied); *see also Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243, 251 (6th Cir. 1996) ("Congressional intent cannot be carried out unless employers are required to adhere to the language of their own Summary Plan Descriptions."). Indeed, every circuit that has squarely addressed the issue holds that summary plan descriptions are binding and must be construed against the employer and in favor of the employee.[2]

Given these principles, the 1991 SPD at issue in this case was required to be accurate, BN was required to adhere to the language of the 1991 SPD, and the 1991 SPD was required to be interpreted strictly in favor of Petitioners. The 1991 SPD provided by BN to the Petitioners unambiguously states that **"management has decided**

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[2] *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988) (employer strictly liable for misleading statement in summary plan description and cannot adopt a plan interpretation which is contrary to that statement. Detrimental reliance on the statement need not be shown); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1515 (10th Cir. 1996) ("Because the SPD best reflects the expectations of the parties to the plan, the terms of the SPD control the terms of the plan itself."); *Aiken v. Policy Mgt. Systems, Corp.*, 13 F.3d 138, 141 (4th Cir. 1993) (if an employee relies upon, or is prejudiced by, faulty statement in summary plan description, employee has actionable ERISA claim); *Heidgerd v. Olin Corp.*, 906 F.2d 903, 909 (2d Cir. 1990) (specifically enforcing statement in SPD against employer); *McKnight v. Southern Life & Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985) (same).

**that if there are any additional plans, the benefits would not be as good as those contained in this plan."** *McCall*, 237 F.3d at 510. Pursuant to the principles discussed above, the Fifth Circuit should have strictly held BN to the terms of this promise. *See Wise*, 986 F.2d at 938. Instead, the Fifth Circuit's opinion explicitly permitted BN to repudiate the commitment made in the No Better Benefits Q&A with impunity. That decision is contrary to the decisions of every circuit (including the Fifth Circuit), which have consistently held that summary plan descriptions are binding.

Because summary plan descriptions must be accurate as a matter of law, *see* 29 C.F.R. § 2520.102, imposing liability only for statements that were false at the time they were made is contrary to law. The Petitioners respectfully submit that the Fifth Circuit overlooked the real issue: Can a plan fiduciary who has voluntarily made an affirmative written promise about the most important aspect of a future plan, *i.e.* the future benefit level, with the specific intent to induce reliance on that representation, repudiate that representation at a later time without any attendant liability? The Fifth Circuit's analysis permitting such conduct ignored the controlling law that (a) affirmative representations about future benefits are fiduciary acts, *Varity Corp.*, 516 U.S. at 502-03, and (b) such representations are binding when made in a summary plan description. *Hansen*, 940 F.2d at 982. In effect, the Fifth Circuit's Opinion holds that a commitment made in an SPD is not binding on the employer, provided only that the statement was not knowingly false at the time it was included in the SPD.

If the Fifth Circuit's ruling is not reversed by this Court, employers will be permitted with impunity to: (a) hold a meeting, (b) make an ultimately non-binding decision that the severance plan being offered is the best that will ever be provided by the company, (c) communicate that decision by making an unconditional promise to the company's employees in an SPD, (d) induce the employees' reliance, (e) wait for the employees to elect to separate from service and (f) then, change its mind when management chooses to implement a new severance plan. Such a result is clearly not consistent with Congress' intent "to protect working men and women from abuses in the administration and investment of private retirement plans and employee welfare plans." *Hansen*, 940 F.2d at 976 (*quoting Donovan*, 688 F.2d at 1370). To the contrary, Petitioners submit that such a ruling sets a dangerous precedent which encourages employers to repudiate written promises that employees have already relied upon, and threatens to undermine the protections and certainty intended to be provided by ERISA.

## II. BN BREACHED FIDUCIARY DUTIES BY FAILING TO ADMINISTER THE 1991 PLAN ACCORDING TO THE SPD.

Every employee benefit plan "shall be established and maintained pursuant to a written instrument," 29 U.S.C. § 1102(a)(1), which in this case was the 1991 SPD. In turn, fiduciaries must administer any plan "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). "Where the trustees impose a standard not required by the pension plan itself, this court has stated that such action would result in an

unwarranted and arbitrary construction of the Plan." *Ganze v. Dart Industries*, 741 F.2d 790, 793 (5th Cir. 1984) (internal quotations omitted). BN's conduct violated its fiduciary duty to properly administer the plan in two ways.

First, when BN denied Petitioners the "better" benefits of the 1995 Plan, it failed to administer the 1991 Plan according to its terms. Because this conduct by BN was in direct contravention of the 1991 SPD, it constitutes a breach of fiduciary duty. *See* 29 U.S.C. § 1002(21)(A)(iii); 29 U.S.C. § 1104(a).

BN breached its fiduciary duty by construing the 1991 SPD in its own self-interest as opposed to the sole and exclusive interest of the Plan participants, as required by 29 U.S.C. § 1104(a). BN chose to make the no better benefit promise in the 1991 SPD. To BN's benefit, the Petitioners agreed to relinquish the lifetime compensation and other guarantees they were entitled to as merger protected employees.[3] Despite demand, BN

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[3] Each of the Petitioners were merger protected employees. *See Great Northern Pac.-Merger-Great Northern*, 331 I.C.C. 228 (1967), *aff'd*, 296 F. Supp. 853 (D.D.C.), *aff'd sub nom. U.S. v. I.C.C.*, 396 U.S. 491 (1970). As merger protected employees, Petitioners were guaranteed to receive full-time pay and benefits based on the Northern Lines Order even if they were laid off or their jobs abolished. BN recognized that these merger protected employees were predisposed "to hang on" with a feeling that a better deal would be offered in the future. As such, the No Better Benefits Q&A was specifically designed to inform these merger protected employees that no future plan would offer better benefits than those contained in the 1991 Plan. By making this commitment, BN intended to induce as many merger protected employees as possible to accept the 1991 Plan.

denied requests to honor the unambiguous promise in the 1991 SPD. As a matter of law, BN's actions are arbitrary and capricious and constitute a breach of fiduciary duty. *See Ganze*, 741 F.2d at 793; *see also, Morgan v. Mullins*, 643 F.2d 1320, 1321 (8th Cir. 1981) (failure to follow clear plan terms violates ERISA); *Gors v. Venoy Palmer Market, Inc.*, 578 F. Supp. 365, 368 (E.D. Mich. 1984) (ERISA fiduciary duties include accurate presentation of summary plan description). Accordingly, the Petitioners' claims to enforce the terms of the 1991 SPD and for equitable relief for breach of fiduciary duty pursuant to 29 U.S.C. §§ 1132(a)(1) and 1132(a)(3) respectively, should have been granted.

Second, BN provided information to Petitioners about the likely future of plan benefits. BN reasonably expected Petitioners to rely upon such information in making decisions related to plan participation. As such, this communication was made in the capacity as an "administrator" and "fiduciary" of the pertinent plan or plans:

> **Conveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation, would seem to be an exercise of a power "appropriate" to carrying out an important plan purpose. After all, ERISA itself specifically requires administrators to give beneficiaries certain information about the plan. See, e.g.,** ERISA §§ 102, 104(b)(1), 105(a). And administrators, as part of their administrative responsibilities, frequently offer beneficiaries more than the minimum

> information that the statute requires – for example, answering beneficiaries' questions about the meaning of the terms of a plan so that those beneficiaries can more easily obtain the plan's benefits. **To offer beneficiaries detailed plan information in order to help them decide whether to remain with the plan is essentially the same kind of plan-related activity.**

*Varity Corp.*, 516 U.S. at 502-03 (emphasis added).

By making promises about the level of benefits in future plans, BN chose to commit to certain future conduct in order to achieve a certain result. In doing so, BN had obligations to investigate the accuracy of such a statement prior to making it and to ensure that the statement was accurate and not in any way misleading to an average reader. The evidence shows both that BN did not investigate the accuracy of its statements at the time it included them in the 1991 SPD, nor did it ensure that these statements were in fact accurate. To the contrary, based on adoption of a plan with better benefits, coupled with BN's decision to deny Petitioners the better benefits contained in that 1995 Plan, BN's statements were false.

Contrary to the District Court and Fifth Circuit's rulings, this is not a case about whether BN and the fiduciaries of the 1991 SPD had a fiduciary duty to predict the future. Instead, this case stands for the proposition that employers who have made binding commitments to their employees are bound by those commitments. *Varity*'s reasoning is wholly consonant with *Hansen* in this regard. If an employer makes written representations in official plan documents and summaries which employees may rely upon as a matter of law,

Congressional intent "to protect men and women from abuses in the administration and investment of private retirement plans and employee welfare plans," *Hansen*, 940 F.2d at 976, and to protect against overreaching and profound inequity, can only be accomplished if the employer and the plans are strictly bound by those statements.

## III. THE PETITIONERS ARE ENTITLED TO A REMEDY FOR THE BREACH OF FIDUCIARY DUTIES.

In addition to allowing BN to breach its promise with impunity, the Fifth Circuit also erred by holding that because the 1991 SPD did not spell out the remedy for BN's breach of the promises in the 1991 SPD, there is no binding obligation to pay the Petitioners the 1995 Plan benefits. *McCall*, 237 F.3d at 513. To support this holding, the Fifth Circuit cited *Wise* for the proposition that "[c]ontractual vesting is a narrow doctrine . . . [therefore] . . . to prevail [Petitioners] must assert strong prohibitory or granting language." *Id.*

The Fifth Circuit's narrow reading of *Wise* is misplaced. The lack of a provision in the 1991 SPD establishing a specific remedy for breach does not make the promises contained in the 1991 SPD unenforceable. Such a holding, if upheld, would permit the terms of an SPD to render the civil enforcement provision of ERISA, 29 U.S.C. § 1132(a), meaningless, and allow plan sponsors to make elaborate fiduciary commitments in a summary plan description without any concern for having to keep them.

As Judge Kazen recognized in his dissent, the remedy for BN's breach of its no better benefits promise was contained within ERISA at 29 U.S.C. § 1132(a). *McCall*, 237 F.3d at 515. Specifically, the appropriate remedy is equitable relief under 29 U.S.C. § 1132(a)(3) in the form of an injunction affirmatively enjoining BN and the other Defendants to constructively reinstate the Petitioners (all of whom had lifetime salary and benefits guarantees) to 1995, with all attendant back pay and benefits, so that they may elect to participate in the 1995 Plan and receive the better benefits provided by that plan, or by the imposition of a constructive trust. Such a remedy will place the Petitioners, who relied on that promise, in the position which they would have been in had BN not breached its fiduciary duty by including the inaccurate No Better Benefits Q&A in the 1991 SPD. *Varity*, 516 U.S. at 511-14.

## CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

DATED this 11th day of June, 2000.

Respectfully submitted,

DAVID B. SESERMAN
*Counsel of Record*
TIMOTHY J. PARSONS
DEAN C. HEIZER
GORSUCH KIRGIS LLP
Tower I, Suite 1000
1515 Arapahoe Street
Denver, Colorado 80202
303/376-5000

ERIC W. PINKER
LYNN TILLOTSON &
PINKER, L.L.P.
750 N. St. Paul Street,
Suite 400
Dallas, Texas 75201
214/981-3800

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In The

# Supreme Court of the United States

JAMES D. McCALL; STANLEY R. COLLINS; E. E. BOWMAN; J. WILLIAM HUFF; MICHAEL N. DANA; O. J. NORMAN; MURL C. LINKE; JOSEPH R. ROBERTS; LAWRENCE S. KISER; NORMAN D. BREHM; WILLIAM S. BRANCH; JEROME P. O'CONNOR; WILLIAM T. DAVIDSON; BART A. WIESLEY; W. H. TICEN; BETTY TITCHENER, executrix of Gerald Titchener's estate; and GEORGE D. STARIHA,

*Petitioners,*

v.

BURLINGTON NORTHERN/SANTA FE COMPANY f/k/a Burlington Northern Railroad Co.; BURLINGTON NORTHERN RAILROAD COMPANY 1991 SEPARATION PAY PLAN; TRUSTEES OF THE BURLINGTON NORTHERN RAILROAD COMPANY 1991 SEPARATION PAY PLAN; TRUSTEES OF THE BURLINGTON NORTHERN RAILROAD COMPANY 1995 VOLUNTARY SEPARATION PLAN; BURLINGTON NORTHERN, INC. PENSION PLAN; TRUSTEES OF THE BURLINGTON NORTHERN, INC. PENSION PLAN; BURLINGTON NORTHERN THRIFT AND PROFIT SHARING PLAN; TRUSTEES OF THE BURLINGTON NORTHERN THRIFT AND PROFIT SHARING PLAN; ALAN W. SPEAKER; JEANNE MICHALSKI; and DONALD SCOTT,

*Respondents.*

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Fifth Circuit**

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

1. Opinion of the Court of Appeals for the Fifth Circuit is reported at 237 F.3d 506 (5th Cir. 2000).....App. 1

2. Decision of the United States District Court for the Northern District of Texas is reported at 61 F. Supp.2d 563 (N.D. Tex. 1999).....App. 17

3. On Petition For Rehearing En Banc.....App. 38

App. 1

United States Court of Appeals,
Fifth Circuit.

James D. McCALL; et al., Plaintiffs,
James D. McCall; Stanley R. Collins; E. E. Bowman; J. William Huff; Michael N. Dana; O. J. Norman; Murl C. Linke; Joseph R. Roberts; Lawrence S. Kiser; Norman D. Brehm; William S. Branch; Jerome P. O'Connor; William T. Davidson; Bart A. Wiesley; W. H. Ticen; Betty Titchener, executrix of Gerald Titchener's estate; and George D. Stariha, Plaintiffs-Appellants,

v.

BURLINGTON NORTHERN/SANTA FE COMPANY f/k/a Burlington Northern Railroad Co.; Burlington Northern Railroad Company 1991 Separation Pay Plan; Trustees of the Burlington Northern Railroad Company 1991 Separation Pay Plan; Trustees of the Burlington Northern Railroad Company 1995 Voluntary Separation Plan; Burlington Northern, Inc. Pension Plan; Burlington Northern Thrift and Profit Sharing Plan; Trustees of the Burlington Northern Thrift and Profit Sharing Plan; Alan W. Speaker; Jeanne Michalski; and Donald Scott, Defendants-Appellees.

**No. 99-11147.**

Dec. 26, 2000.

*Dean C. Heizer, David Brian Seserman, Timothy J. Parsons* (argued), Gorsuch Kirgis, Denver, CO, *Eric Wolf Pinker*, Lynn, Tillotson & Pinker, Dallas, TX, for Plaintiffs-Appellants.

Steven W. Sloan (argued), Thompson & Knight, Dallas, TX, *Charles Wade Shewmake*, Burlington Northern & Santa Fe Ry. Co., Fort Worth, TX, for Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before *KING*, Chief Judge, *PARKER*, Circuit Judge, and *KAZEN**, District Judge.

*ROBERT M. PARKER*, Circuit Judge:

Plaintiffs James D. McCall, Stanley R. Collins, E.E. Bowman, J. William Huff, Michael N. Dana, O.J. Norman, Murl C. Linke, Joseph R. Roberts, Lawrence S. Kiser, Norman D. Brehm, William S. Branch, Jerome P. O'Connor, William T. Davidson, Bart A. Wiesley, W.H. Ticen, Betty Titchener, and George D. Stariha appeal the summary judgment entered for defendants (collectively referred to "Burlington Northern") on claims brought pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, *29 U.S.C. § 1001, et seq.* We affirm.

## I. FACTS AND PROCEDURAL HISTORY

In 1991, Burlington Northern determined that it was necessary to reduce its workforce by 500 individuals. Burlington Northern first attempted to reach its targeted workforce level through a voluntary separation pay plan. Donald W. Scott, Burlington Northern's Senior Vice President of Human Resources, was charged with designing and implementing the 1991 Burlington Northern Railroad Separation Pay Plan ("1991 Plan"). Burlington Northern employees with more than ten years of service and who

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* District Judge of the Southern District of Texas, sitting by designation.

were 55 years of age or older, were eligible to participate in the 1991 plan. The primary benefit offered by the 1991 Plan was a lump sum payment computed pursuant to the following formula: "2 weeks base salary times years of service to a maximum of two times annual base salary."

In Scott's prior experience with voluntary separation pay plans at Burlington Northern, employees seemed unwilling to take advantage of the plans because they assumed that there might be another, more generous pay plan adopted in the near future. Scott recommended adopting a plan that would be as generous as possible, in order to accomplish the targeted voluntary workforce reduction without resorting to involuntary layoffs. Other Burlington Northern managers concurred.

Included with the Summary Plan Description ("SPD") was a series of questions and answers designed to answer anticipated employee questions about the 1991 Plan. One of the questions and answers (referred to as the "No Better Benefits Q&A") was the following:

> Q: Will there be another opportunity to participate in a separation pay plan after this one?
>
> A: The company is offering this plan in an effort to reduce its expenses due to business conditions. At this time, the company's management has not decided whether there will be any additional voluntary separation plans. However, management has decided that if there are any additional plans, the benefits would not be as good as those contained in this plan.

Plaintiffs are former employees of Burlington Northern who accepted the 1991 Plan's offer of compensation in return for voluntarily ending their employment. In

1995, Burlington Northern adopted an additional voluntary separation plan ("1995 Plan") that provided better benefits than those in the 1991 Plan. In particular, the 1995 Plan offered separation pay for eligible employees equal to two years' base salary. Plaintiffs requested benefits under the 1995 Plan based upon the No Better Benefits Q & A. Burlington Northern denied the requests. Plaintiffs brought suit asserting claims for breach of fiduciary duty under ERISA, denial of benefits in violation of ERISA, estoppel, and interference with plan benefits under § 510 of ERISA, *29 U.S.C. § 1140*. The district court entered summary judgment for Defendants and Plaintiffs timely appealed.

## II. ANALYSIS

We review the district court's grant of summary judgment *de novo*, viewing all facts in the light most favorable to Plaintiffs. *Merritt-Campbell, Inc. v. RxP Prods., Inc.*, 164 F.3d 957, 961 (5th Cir.1999).

### *A. Breach of Fiduciary Duty*

A plan participant may bring suit for breach of fiduciary duty to obtain "appropriate equitable relief" to redress violations of ERISA. *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996). Plaintiffs alleged that three acts by Burlington Northern give rise to their causes of action which the district court characterized as breach of fiduciary duty claims:[1] (1) drafting

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[1] On appeal, Plaintiffs do not identify the statutory basis for some of their arguments. They assert that defendants are

and distributing the 1991 Plan Q & A section, (2) enacting the 1995 Plan, and (3) denying their claims for benefits under the 1995 Plan.

*1. Drafting the 1991 Plan*

Providing information to beneficiaries about likely future plan benefits falls within ERISA's statutory definition of a fiduciary act. *Varity, 516 U.S. at 502-503, 116 S.Ct. 1065.* When an ERISA plan administrator speaks in its fiduciary capacity concerning a material aspect of the plan, it must speak truthfully. *Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533, 1538 (3d Cir.1996).[2]

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"bound" by the No Better Benefits Q&A, but do not articulate that claim in terms of ERISA's protections. We will analyze plaintiffs' contentions within the framework of specific ERISA civil enforcement provisions invoked by their pleadings and ruled on by the district court.

[2] The Fifth Circuit has not yet set out the boundaries of a fiduciary's legal obligation to truthfully inform employees about possible future employee benefit plans. Seven of our sister circuits have held that there is no breach of fiduciary duty in failing to inform beneficiaries about a future plan until and unless that plan is under "serious consideration." *Bins v. Exxon Co.*, 189 F.3d 929, 934-37 (9th Cir.1999); *Vartanian v. Monsanto Co.*, 131 F.3d 264 (1st Cir.1997); *Hockett v. Sun Co., Inc.*, 109 F.3d 1515, 1522 (10th Cir.1997); *Muse v. IBM Corp.*, 103 F.3d 490, 493 (6th Cir.1996); *Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533 (3d Cir.1996); *Wilson v. Southwestern Bell Tel. Co.*, 55 F.3d 399, 405 (8th Cir.1995); *Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir.1991). The Second Circuit, on the other hand, declined to treat serious consideration as a "talismanic" indicator, but listed it as one factor in the materiality inquiry. *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 122-23 (2d Cir.1997). It is undisputed, in this record, that the 1995 Plan was not conceived until several years

The district court determined that there was no genuine issue of fact in the summary judgment record concerning whether the statements contained in the No Better Benefit Q&A were truthful when made. Plaintiffs contend that the evidence raises a genuine issue of material fact concerning the truthfulness of the statement that *management* had made a decision regarding future benefits. Specifically, the evidence shows that Don Scott, Burlington Northern's Senior Vice President of Human Resources, made the decision that Burlington Northern would not offer a future plan with better benefits based on his understanding of the management group's intention that the 1991 Plan should be the last time a voluntary separation plan would have to be offered for the purpose of a voluntary workforce reduction. Plaintiffs point to evidence that Burlington Northern's Executive Committee did not specifically discuss or decide whether there were to be any future voluntary separation plans and if so, whether or not the benefits would be better than those offered in the 1991 Plan. Plaintiffs take the position that Scott's decision was inaccurately characterized as the management's decision. Because it is undisputed that Scott was the member of senior management charged with responsibility for making decisions in the benefits area of the business and for implementing them, we find no genuine issue of material fact regarding the truth of the statement that management had made the decision. *Cf. Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533, 1540 (3d

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after Plaintiffs made their decision to retire. Finding the question not properly presented, we decline the parties' invitation to adopt or reject the "serious consideration" test for the Fifth Circuit.

Cir.1996) (reciting the test for determining whether a change has received "serious consideration," and limiting "senior management" to those individuals who have responsibility for the benefits area of the business, and who will ultimately make recommendations to the board regarding benefits operation).

Because we conclude that the No Better Benefit Q&A was truthful when made, it cannot support a cause of action against Burlington Northern for breach of fiduciary duty based on a material misrepresentation.

*2. Adopting the 1995 Plan*

Plaintiffs next contend that Burlington Northern breached its fiduciary duty by adopting the 1995 Plan with significantly better benefits than those contained in the 1991 Plan, relying on the rule that "clear and unambiguous statements in the summary plan description are binding." *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 938 (5th Cir.1993). An employer who adopts, amends or terminates an employee benefit plan is not acting as a fiduciary. *Lockheed Corp. v. Spink*, 517 U.S. 882, 889-90, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996). Therefore, Plaintiff has not stated a cause of action for breach of fiduciary duty concerning the adoption of the 1995 plan.

*3. Denial of Benefits Under the 1995 Plan*

Plaintiffs argue that Burlington Northern breached a fiduciary duty owed to them by denying their claims for benefits under the 1995 Plan. When a beneficiary wants what was supposed to have been distributed under a

plan, the appropriate remedy is a claim for denial of benefits under § 502(a)(1)(B) of ERISA rather than a fiduciary duty claim brought pursuant to § 502(a)(3). *Corcoran v. United HealthCare, Inc.*, 965 F.2d 1321, 1335 (5th Cir.1992). We therefore reject Plaintiffs' breach of fiduciary duty claim based on denial of benefits.

*B. Denial of Benefits Under § 502(a)(1)(B).*

ERISA authorizes a civil action by a participant "to recover benefits due to him under the terms of his plan." *29 U.S.C. § 1132(a)(1)(B).* We review Burlington Northern's plan administrator's interpretation of the plan for abuse of discretion, based on language in both the 1991 and 1995 plans giving the plan administrator discretion to review plan terms and decide claims for benefits.[3] *Pierre v. Connecticut Gen. Life Ins. Co.*, 932 F.2d 1552, 1555-62 (5th Cir.1991). The plan administrator's factual determinations are likewise reviewable for abuse of discretion. *Id.*

This Circuit employs a two-step analysis for determining whether a plan administrator abused its discretion in denying a participant plan benefits. *Rhorer v. Raytheon Eng'rs and Const'rs, Inc.*, 181 F.3d 634, 639 (5th Cir.1999). First we must determine the legally correct interpretation of the plan and whether the administrator's interpretation accords with the proper legal interpretation. *Id.* If the administrator's construction is legally

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[3] The 1991 and 1995 plan SPDs both provide that the plan administrator is "[r]esponsible for the general administration of the plan, including interpretation and communication of the plan, [and] the determination and right of any person to benefits and the payment of benefits."

sound, then no abuse of discretion occurred and the inquiry ends. *Id.* But if the court concludes that the administrator has not given the plan the legally correct interpretation, the court must then determine whether the administrator's interpretation constitutes an abuse of discretion. *Id.* A decision is not an abuse of discretion if a reasonable person could have reached a similar decision, given the evidence before him. *Cash v. Wal-Mart Group Health Plan*, 107 F.3d 637, 641 (8th Cir.1997).

In examining the proper interpretation of the 1991 Plan, we are guided by three rules. First, the SPD is binding and if there is conflict between the SPD and the terms of the plan itself, the SPD controls. *Rhorer, 181 F.3d at 640.* Second, any ambiguities in the SPD must be resolved in the employee's favor. *Id. at 641.* Third, the SPD must be read as a whole. *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 981 (5th Cir.1991). It would be error to attend only to one paragraph, page, or portion of the summary. *Id.*

The Burlington Northern plan administrator determined that Plaintiffs were not due the enhanced benefits under the terms of the 1991 and 1995 plans. Plaintiffs were not active employees in 1995 and do not argue that they were eligible under the plain terms of the 1995 Plan for benefits arising from voluntary separation from Burlington Northern employment in 1995. Instead, they argue that the Plan Administrator abused its discretion in failing to interpret the statement "management has decided that if there are any additional plans, the benefits would not be as good as those contained in this plan" to mean "if there are ever any plans with benefits better

than the current plan, you will be entitled to benefits under that plan."

While Burlington Northern is bound by statements in the Plan documents, they are not bound by silence. *Wise, 986 F.2d at 938.* Contractual vesting is a narrow doctrine. *Id.* To prevail, Plaintiff must assert strong prohibitory or granting language. *Id.* The 1991 Plan is silent as to any potential remedy for the violation of the alleged promise never to offer a better plan. Therefore, there is no binding obligation to pay 1995 Plan benefits to Plaintiffs.

Moreover, Plaintiffs' proposed reading relies on the assumption that management has committed itself never to change the decision announced in the Q&A. That interpretation is belied by the statement, appearing two pages earlier in the same SPD, that "[t]he Company reserves the right to amend and/or terminate this plan at any time for any purpose." It is clear that ERISA allows an employer to amend its beneficiary plan without explicitly reserving that right in its SPD. *Id. at 936.* The combined force of ERISA's statutory allowance of plan amendments and Burlington Northern's reservation of that right in the 1991 Plan forces us to conclude that the plan administrator's interpretation of the 1991 Plan was legally correct. Therefore, we find no abuse of discretion in the denial of Plaintiffs' claims for benefits under the 1995 Plan.

*C. Estoppel*

Plaintiffs allege that Burlington Northern is estopped from denying their claims for benefits under the 1995 Plan. The district court held that Plaintiffs' estoppel cause of action is not cognizable because when a party seeks to

recover benefits owed under an ERISA plan, state law estoppel claims are preempted by ERISA. *Transitional Hosps. Corp. v. Blue Cross and Blue Shield of Texas,* Inc., 164 F.3d 952, 954 (5th Cir.1999). On appeal, Plaintiffs contend that they are asserting "ERISA estoppel," citing *Curcio v. John Hancock Mut. Life Ins. Co.,* 33 F.3d 226, 235-38 (3d Cir.1994). The Fifth Circuit has never adopted "ERISA estoppel," and has in fact expressed doubt as to whether a cause of action for estoppel is cognizable under ERISA based upon written statements. *Weir v. Federal Asset Disposition Ass'n,* 123 F.3d 281, 290 (5th Cir.1997).

We need not consider the availability of ERISA estoppel because, even if we assume the cause of action is available to Plaintiffs, they cannot establish the elements necessary to prevail: (1) a material misrepresentation, (2) reasonable and detrimental reliance upon the representation, and (3) extraordinary circumstances. *Id.* Having already concluded that Burlington Northern's representations, which were true when made are not material misrepresentations, we affirm the district court's grant of summary judgment on Plaintiffs' estoppel claim.

*D. Interference with Attainment of Benefits*

Plaintiffs alleged a claim for interference with the receipt of plan benefits in violation of ERISA § 510, *29 U.S.C. § 1140.* The claim is premised on the allegation that the 1991 Plan SPD contained misrepresentations intentionally calculated to cause Plaintiffs to leave their employment, thus giving up compensation and benefits they otherwise would have earned had they continued working. Section 510 of ERISA prohibits employers from

discharging employees for the purpose of interfering with their attainment of any right to which they are entitled under an employee benefit plan. *Id.; Perdue v. Burger King Corp.*, 7 F.3d 1251, 1255 (5th Cir.1993). Plaintiffs contend that Burlington Northern's statement in the No Better Benefits Q&A caused them to resign when they would not have otherwise done so and therefore their resignations should not be considered voluntary. The success of this claim depends upon a finding that Burlington Northern misrepresented the truth in the No Better Benefit Q&A. The district court held that there is no genuine issue of material fact concerning whether Burlington Northern misrepresented present facts when they made the statements in question. We agree and therefore affirm the district court's grant of summary judgment.

## III. CONCLUSION

Based on the foregoing, we affirm the summary judgment in favor of Burlington Northern.

AFFIRMED.

*KAZEN*, District Judge, dissenting:

As the majority opinion reflects, Burlington Northern designed the 1991 Separation Pay Plan ("the Plan") to entice as many employees as possible to accept voluntary separation. To that end, the Summary Plan Description ("SPD") explicitly stated that:

> "The company is offering this Plan in an effort to reduce its expenses due to business conditions. At this time, the company's management has not decided whether there will be any additional voluntary separation plans. However,

> management has decided that if there are any additional plans, the benefits would not be as good as those contained in this plan."

The majority concludes that in making this representation, Burlington Northern did not breach its fiduciary duty as an ERISA plan administrator because the statements were true when made. That holding initially was made by the district court as a matter of law in a summary judgment proceeding. I believe that there is a genuine fact dispute on this issue. The evidence is that Don Scott alone made the quoted decision that there would be no better benefits in the future. There is also evidence that all important decisions were to be reviewed by other members of senior management. In deposition testimony, Scott recalled a presentation about the Plan to senior management in which he explained "that what we were trying to do was to offer a comfort to employees that if they took this benefit, that it was going to be the best available, that there wasn't going to be another plan immediately behind it of a higher value." On the other hand, the district court acknowledged testimony of other members of the management team "that they did not discuss, review, or approve the verbiage" included in the 1991 Plan. Nevertheless, the district court held, and the majority apparently agrees, that Scott's unilateral decision can truthfully be labeled as a decision by "management" under the test that a plan need be considered only by "those members of senior management with responsibility for the benefits area of the business, and who would ultimately make recommendations to the board regarding benefits operations."

The quoted language is taken from the opinion in *Fischer v. Philadelphia Electric Company*, 96 F.3d 1533, 1540 (3rd Cir.1996). That case dealt with the common scenario of complaints by employees that their employer was actually giving "serious consideration" to a retirement plan while either denying or failing to disclose that circumstance to the employees. The *Fischer* court was concerned with when a future plan is under "serious consideration." *Fischer* recognized that typically only the Board of Directors can actually implement changes in a benefit package, but concluded that for the "serious consideration" test, it is only necessary that the plan is being considered by those members of senior management responsible for making recommendations to the Board.

In my view, there is a qualitative distinction between determining whether someone in high management is "seriously considering" a future plan and determining whether a company actually has made an important unequivocal decision about a feature of an already promulgated plan. In the face of deposition testimony by senior management members that they never even saw, much less discussed, the SPD language quoted above, it cannot be said as a matter of law that "management has decided" that no future plan would have better benefits. The truth of that representation should be decided by the fact finder.

I also disagree that the plaintiffs cannot sue to recover benefits due under the 1991 Plan. As stated in the majority opinion, the SPD is binding and controls over any conflict with the Plan itself. Further, any ambiguities in the SPD must be resolved in the employees' favor. The majority holds that although Burlington Northern is

bound by statements in the Plan documents, it is "not bound by silence," citing *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir.1993). The precise language from the *Wise* opinion is: "While clear and unambiguous statements in the summary plan description are binding, the same is not true of silence." *Id. at 938.* The instant case does not involve silence but rather a clear and unambiguous statement, namely that no future plan would have better benefits. The majority states that because the Plan is silent as to a potential remedy, it is somehow unenforceable. The remedy is provided by statute itself, *29 U.S.C. § 1132(a).* The majority also characterizes the plaintiffs' argument as being that management had committed "never to change the decision announced in the Q & A" and that this assumption was belied by other language giving the Company the right to amend and/or terminate the Plan at any time for any purpose. Plaintiffs do not dispute Burlington Northern's right to amend the 1991 Plan, but Burlington Northern never attempted to exercise that right. Moreover, the plaintiffs do not contend that Burlington Northern could never again design a voluntary separation plan. Indeed, the disputed language in the SPD specifically left open the option of future plans. What is at issue is a positive, unequivocal statement that "management has decided that if there are any additional plans, the benefits would not be as good as those contained in this plan." The majority again relies on *Wise* for the proposition that "contractual vesting is a narrow doctrine." *986 F.2d at 938.* In *Wise,* the company had issued SPDs as early as 1977 but in 1985 issued new SPDs which, for the first time, explicitly stated that the company had the right to alter, amend, or otherwise

change the plan. In October 1985, the company announced that it would continue previous benefits only for employees who retired before March 1, 1986, and anyone retiring after that day would forfeit company-paid coverage. *Id. at 933.* The litigation was brought by employees who retired after the cutoff date of March 1, 1986, contending that their rights in previous plans had somehow vested earlier. *Wise* was specifically concerned only with "employees who had not retired as of the date of the disputed change." *Id. at 936.* Under the instant plan, employees could elect to participate between June 17 and August 1, 1991. If these plaintiffs had attempted to participate after that time, or if the company had attempted to amend the Plan sometime before the plaintiffs made their election, there might be a legitimate issue of vesting rights. As it is, however, there was no amendment to the Plan at any time, and there is no doubt that the plaintiffs voluntarily left their employment while the language at issue was in effect.

For the foregoing reasons, I respectfully dissent.

United States District Court,
N.D. Texas,
Dallas Division.

**James D. McCALL, et al., Plaintiffs,**

**v.**

**BURLINGTON NORTHERN/SANTA FE COMPANY, f/k/a Burlington Northern Railroad Company, et al., Defendants.**

**No. Civ.A. 3:96-CV-2205-L.**

Aug. 31, 1999.

David B. Seserman, Dean C. Heizer, Gorsuch Kirgis LLP, Denver, CO, Eric W. Pinker, Lynn Stodghill Melsheimer & Tillotson, L.L.P., Dallas, TX, for plaintiffs.

Steven W. Sloan, Jerry D. Mason, Thompson & Knight, P.C., Dallas, TX, Charles W. Shewmake, Lawrence M. Stroik, Fort Worth, TX, for defendants.

*MEMORANDUM OPINION AND ORDER*

LINDSAY, District Judge.

Before the court are Defendants' Motion for Summary Judgment, and Plaintiffs' Motion for Summary Judgment on Liability, both filed March 10, 1998. The court has carefully considered the motions, responses, replies, record evidence, and the applicable law. For the reasons that follow, Defendants' Motion for Summary Judgment **is granted in part** and **denied in part**, and Plaintiffs' Motion for Summary Judgment on Liability **is denied**.

## I. *Factual and Procedural Background*

Plaintiffs are a group of employees who retired from Defendant Burlington Northern Railroad Company ("BN") in 1991.[1] The Plaintiffs' retirement was pursuant to the terms of a voluntary separation plan entitled the Burlington Northern Railroad Company 1991 Separation Pay Plan (the "1991 Plan"). BN adopted the 1991 Plan for the purpose of reducing its workforce.

When BN announced the availability of the 1991 Plan, it stated that it was implementing the plan due to an apparent need to cut operational costs combined with the financial impact of the severe ongoing economic recession being experienced in the United States at that time. Before choosing to separate from service under the 1991 Plan, Plaintiffs were given a summary plan description to review (the "1991 SPD"). The 1991 SPD contains the following pivotal question and answer:[2]

> Q. Will there be another opportunity to participate in a separation pay plan after this one?
>
> A. The company is offering this plan in an effort to reduce its expenses due to business conditions. At this time, the company's management has not yet decided if there will be any additional voluntary separation plans. However,

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[1] The facts in this section are mostly undisputed. Any disputed facts are presented in the light most favorable to Plaintiffs.

[2] Plaintiffs and Defendants disagree whether the question and answer section of the booklet presented to Plaintiffs prior to their retirement is actually a part of the SPD; however, the answer to this question is not material to a determination of the issues in this case.

> management has decided that if there are any additional plans, the benefits would not be as good as those contained in this plan.[3]

(The "1991 Q & A"). The 1991 SPD provided that each eligible plan participant would receive a lump sum payment of two weeks base salary times years of service, up to a maximum of two times annual base salary. Plaintiffs accepted the terms of the 1991 Plan and signed a release voluntarily terminating their employment with BN, and releasing BN from all causes of action or claims arising out of their employment. Each Plaintiff received all benefits due under the 1991 Plan.

In 1995 BN again decided to offer a voluntary separation pay plan (the "1995 Plan"). BN decided to adopt the 1995 Plan after a consultant it had hired advised BN that it could accomplish the same work with fewer people, and that certain work could be eliminated entirely. Only active BN employees were eligible for the 1995 Plan. Plaintiffs claim that had they continued their employment with BN instead of retiring in 1991, they would have received a larger severance payment under the 1995 Plan than they did under the 1991 Plan.

After the 1995 Plan was announced, three Plaintiffs applied for benefits under that plan. Plaintiffs' claims for benefits under the 1995 Plan were denied by BN. BN told these individuals that they could not receive benefits under the 1995 Plan because they were not active employees when the 1995 Plan was introduced and thus were ineligible to participate in the 1995 Plan. Unhappy

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[3] Joint Appendix at Joint Exh. 1.

with BN's response, Plaintiffs filed this suit on August 6, 1996. They assert claims for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA"), denial of benefits in violation of ERISA, estoppel, and interference with plan benefits under section 510 of ERISA, 29 U.S.C. § 1140. Defendants now move for summary judgment on all of Plaintiffs' claims. Plaintiffs also have moved for summary judgment on the liability aspect of their claims.

## II. *Summary Judgment Standard*

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Ragas v. Tennessee Gas Pipeline Company*, 136 F.3d 455, 458 (5th Cir.1998). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). When ruling on a motion for summary judgment, the court is required to view all inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Ragas*, 136 F.3d at 458.

Once the moving party has made an initial showing that there is no evidence to support the nonmoving

party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita*, 475 U.S. at 586, 106 S.Ct. 1348. Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir.1996). The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Ragas*, 136 F.3d at 458. Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support Plaintiff's opposition to Defendants' motion. *Id.*, *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n. 7 (5th Cir.), *cert. denied*, 506 U.S. 832, 113 S.Ct. 98, 121 L.Ed.2d 59 (1992). "Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. Disputed fact issues which are "irrelevant and unnecessary" will not be considered by a court in ruling on a summary judgment motion. *Id.* If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322-23, 106 S.Ct. 2548.

## III. *Defendants' Motion for Summary Judgment*

Defendants contend that there is no genuine issue of material fact present concerning any of Plaintiffs' claims, so that they are entitled to judgment as a matter of law. Each claim will be addressed separately below.

### A. *Breach of Fiduciary Duty*

Plan participants and beneficiaries are permitted to bring suit against ERISA plan administrators for breach of fiduciary duty. 29 U.S.C. § 1109; *Texas Life, Acc., Health & Hospital Service Ins. Guaranty Assn. v. Gaylord Entertainment Co.*, 105 F.3d 210, 214 (5th Cir.), *cert. dism'd* 521 U.S. 1113, 117 S.Ct. 2501, 138 L.Ed.2d 1006 (1997). Plaintiffs bring three claims that can be characterized as breach of fiduciary duty claims. Plaintiffs' First and Second Claims for Relief challenge BN's actions in drafting and distributing the 1991 Plan Q & A section, enacting the 1995 Plan, and denying claims for benefits under the 1995 Plan.

#### 1. *Drafting and Distribution of the 1991 Plan*

This claim is based on Defendants' statement in the question and answer section of the 1991 SPD that "[m]anagement has decided that if there are any additional plans, the benefits would not be as good as those contained in this plan."[4] Plaintiffs and Defendants have framed the legal issues related to this statement somewhat differently; however, both arguments merit consideration.

Defendants argue that the issue raised by Plaintiffs first two claims for relief is "when a fiduciary has a legal obligation to truthfully inform employees about possible future employee benefits plans."[5] Plaintiffs, on the other

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[4] Joint Appendix at Joint Exh. 1.

[5] Defendants' Motion for Summary Judgment ("Defendants' Motion") at p. 8.

hand, characterize the 1991 Q & A as an unequivocal promise made with specific intent to induce their reliance thereon.[6] Plaintiffs thus argue that by enacting the 1995 Plan, Defendants have breached a binding representation and accordingly are liable to Plaintiffs for breach of fiduciary duty.

In support of their argument, Defendants correctly state that the Fifth Circuit has not considered the question of when fiduciaries become obligated to disclose information regarding future plans. They rely, however, on numerous opinions from other circuits that have considered the issue. *See, e.g., Vartanian v. Monsanto Co.*, 131 F.3d 264 (1st Cir.1997); *Hockett v. Sun Co.*, 109 F.3d 1515 (10th Cir.1997); *Muse v. International Business Machines Corp.*, 103 F.3d 490 (6th Cir.1996), *cert. denied*, 520 U.S. 1240, 117 S.Ct. 1844, 137 L.Ed.2d 1048 (1997); and *Fischer v. Philadelphia Electric Co.*, 96 F.3d 1533 (3d Cir.1996), *cert. denied*, 520 U.S. 1116, 117 S.Ct. 1247, 137 L.Ed.2d 329 (1997) ("*Fischer II*"). These cases hold that there is no breach of fiduciary duty in making representations about a future plan until that plan is under "serious consideration" by company management. *Vartanian*, 131 F.3d at 271; *Hockett*, 109 F.3d at 1522; *Muse*, 103 F.3d at 493; *Fischer II*, 96 F.3d at 1538.

Three circuits have further refined the concept of "serious consideration" into a three-part test. Under this test, a new plan is under serious consideration when (i) a specific proposal (ii) is being discussed for purposes of

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[6] Plaintiffs' Response to Defendants' Cross-Motion for Summary Judgment ("Plaintiffs' Response") at p. 4.

implementation (iii) by senior management with authority to implement the change. *Vartanian,* 131 F.3d at 271; *Hockett,* 109 F.3d at 1523; *Fischer II,* 96 F.3d at 1539. These cases hold that "until these three factors intersect, misrepresentations regarding future plan changes cannot be material, and thus cannot constitute a breach of fiduciary duty." *Hockett,* 109 F.3d at 1523, *citing Fischer II,* 96 F.3d at 1538.

The rationale behind these decisions is that employers frequently review their employee benefit plans on an ongoing basis as a regular part of their business operations. If any management discussion regarding these plans is required to be disclosed to employees, employers will be burdened with providing a "constant, ever-changing stream of information" to plan participants. *Hockett,* 109 F.3d at 1523. Moreover, employees would be confronted with an "avalanche of [employer] notices and disclosures" that would actually impair their ability to make sound decisions regarding retirement. *Fischer II,* 96 F.3d at 1539. Therefore, only when a plan is being seriously considered will a fiduciary obligation arise requiring disclosure of the plan to employees.

In another opinion, the Sixth Circuit aptly noted that the rationale for the three-part serious consideration test discussed above protects employees by giving employers the freedom to adopt more generous plans in the future. Employers should not be "forever deterred from giving [their] employees a better deal merely because [they] did not clearly indicate" to previous employees that a "better deal might one day be proposed." *Swinney v. General Motors Corp.,* 46 F.3d 512, 520 (6th Cir.1995). Requiring employers to disclose plans before they are adopted

could discourage them from improving their pension benefits, which is contrary to the purposes of ERISA. *Lee v. E.I. DuPont de Nemours and Co.*, 894 F.2d 755, 758 (5th Cir.1990).

In the instant case, neither party contends that BN's management was seriously considering the 1995 Plan at the time the 1991 Plan was offered to, and accepted by, Plaintiffs. The factual record similarly reflects that this was not the case. Therefore, if the "serious consideration" standard advocated by Defendants were strictly applied here, Defendants would be entitled to judgment as a matter of law on Plaintiffs' breach of fiduciary duty claims.

In response, Plaintiffs rely on the Second Circuit's decision in *Ballone v. Eastman Kodak Co.*, 109 F.3d 117 (2d Cir.1997). In *Ballone*, the court recognized the significance of the serious consideration test but held that it is but one factor in the court's ultimate inquiry, which is whether an ERISA fiduciary has made "guarantees regarding future benefits that misrepresent present facts," and whether those representations are material in that they would induce a reasonable person to rely upon them. 109 F.3d at 122. Communications regarding future plan benefits are fiduciary acts. *Varity Corp. v. Howe*, 516 U.S. 489, 505, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996). Affirmative material misrepresentations about proposed future changes to an employee benefit plan are actionable as breaches of fiduciary duty under ERISA. *Id.; Pocchia v. NYNEX Corp.*, 81 F.3d 275, 278 (2d Cir.), *cert. denied*, 519 U.S. 931, 117 S.Ct. 302, 136 L.Ed.2d 220 (1996).

The court agrees with Plaintiffs that the disputed statement in the 1991 Q & A affirmatively represents that BN's management had not, at that point, decided to offer any future plans with better benefits than those included in the 1991 Plan. Therefore, it must determine whether the evidence raises a fact issue concerning the materiality and truthfulness of this statement.

To be actionable, the statement must be an affirmative misrepresentation of current facts regarding future plan benefits. *Ballone,* 109 F.3d at 122. Moreover, statements that accurately indicate the employer's intent at the time are not material misrepresentations leading to a breach of fiduciary duty under ERISA. *Swinney,* 46 F.3d at 520; *Barnes v. Lacy,* 927 F.2d 539, 544 (11th Cir.), *cert. denied,* 502 U.S. 938, 112 S.Ct. 372, 116 L.Ed.2d 324 (1991). For example, in *Barnes* the company announced that the retirement program being offered was a "one-time offer" and that "it did not contemplate making any further or later offers of retirement." 927 F.2d at 543. The employees in that case alleged that they understood these statements to mean that they would have no later opportunity for a better retirement package than that currently being offered. Two years later another retirement plan was offered, and the employees who retired under the first plan sued, alleging that the company's statements in connection with the first plan were material misrepresentations. The Eleventh Circuit disagreed with the plaintiffs and held that because the statements were truthful when made, the employer could not be liable for breach of fiduciary duty. *Id.* at 544. The court added that it would be inequitable and unreasonable to expect an employer to predict future, unintended events. *Id., accord Lee,* 894 F.2d

at 758 (duty to prematurely predict and disclose future plan amendments would discourage employers from offering better plans, to the detriment of employees).

Plaintiffs argue that the statement is a material misrepresentation because BN's Executive Committee "did not discuss much less decide that if there were to be any additional voluntary separation pay plans, the benefits would not be as good as those described in the 1991 SPD."[7] In support of this assertion, Plaintiffs cite to the testimony of several Executive Committee members, including Don Scott ("Scott"), BN's Senior Vice President of Human Resources at the time. Other than Scott (the drafter of the 1991 Q & A), each of these witnesses testified that they did not discuss, review, or approve the verbiage included within the 1991 Q & A.[8]

This testimony is consistent with Scott's testimony that he alone made the decision that BN would not offer a future plan with better benefits than the 1991 Plan, based upon his understanding of the management group's intention that the 1991 Plan should be the last time a voluntary separation plan would have to be offered for the purpose of a workforce reduction aimed at satisfying the company's financial objectives.[9] Scott further testified that the phrases "the Company" and "management has decided" in the 1991 Q & A refer solely to his decision to make the 1991 Plan "rich" enough to satisfy the Executive

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[7] Plaintiffs' Response at p. 4.

[8] Joint Appendix at Plaintiffs' Exh. 6, pp. 26-29; Plaintiffs' Exh. 7, pp. 27-28 and 35-36; and Plaintiffs' Exh. 9 at p. 31.

[9] *Id.* at Defendants' Exh. B, pp. 168-70.

Committee's desire to appropriately downsize its workforce, without having to do so again, and to make employees feel comfortable accepting the 1991 Plan without concern that a better plan would follow shortly thereafter.[10] Scott has testified that the statement regarding management's intentions for future plans was true when made.[11] Plaintiffs have attempted to raise a fact issue regarding Scott's statement by relying on the above evidence showing that other members of BN management did not review or discuss the language in the 1991 SPD and Q & A; however, this evidence does not raise a fact issue whether Scott's statement regarding "no better benefits" in future plans was untruthful at the time it was made. The summary judgment evidence supports Defendants' position that the 1991 Q & A did not contain a material misrepresentation, and Plaintiffs have failed to set forth any evidence raising a fact issue on this point.

Plaintiffs' argument that the crucial statement is untrue because Scott and not the entire Executive Committee made the ultimate decision regarding future plan benefits ignores both the relevant facts and the applicable legal test for a material misrepresentation in an ERISA case. Under that test, a plan need only be considered by "those members of senior management with responsibility for the benefits area of the business, and who will ultimately make recommendations to the board regarding benefits operation." *Fischer II*, 96 F.3d at 1540; *see also Hockett*, 109 F.3d at 1524. It is undisputed that Scott's

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[10] *Id.* at Defendants' Exh. B, p. 92; Plaintiffs' Exh. 2, pp. 83-84.

[11] *Id.* at Defendants' Exh. B, p. 170.

duties as a member of BN's management team fit this description[12]; thus, under this test Defendants' statement that management had decided there would be no better plan benefits offered in the future was truthful. Therefore, it appears that there is no genuine issue of material fact present in the record regarding Defendants' alleged misrepresentations, so that Defendants are entitled to judgment as a matter of law on this portion of Plaintiffs' breach of fiduciary duty claim (Plaintiffs' Second Claim for Relief).[13]

### 2. *Enactment of the 1995 Plan*

Plaintiffs further claim that Defendants breached their fiduciary duty when they "enacted the 1995 Plan with significantly better benefits than those contained in the 1991 Plan."[14] Defendants argue that they are entitled to summary judgment on this portion of Plaintiffs' fiduciary duty claim because an employer who adopts, amends or terminates an employee benefit plan is not acting as a

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[12] *Id.* at Defendants' Exh. A, ¶¶ 2-3. BN's management structure was such that each officer or manager was delegated the authority to make decisions in his particular area of responsibility. Very important decisions were reviewed with other members of management, but absent strong dissension or opposition, the recommendation of the officer responsible for that particular area of the company would be implemented without a formal vote of the Executive Committee. *Id.* at ¶ 3. Plaintiffs have not produced any summary judgment proof raising a fact issue on this point.

[13] Plaintiffs' First Amended Original Complaint ("Complaint") at pp. 9-11.

[14] Complaint at p. 9.

fiduciary. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 889-90, 116 S.Ct. 1783, 135 L.Ed.2d 153 (1996). For this reason, Defendants claim they cannot be liable for breach of fiduciary duty for adopting the 1995 Plan.

Plaintiffs attack Defendants' position on this issue by arguing that if Defendants' position were adopted, even fiduciaries who lie about plans to adopt future benefit programs would not be liable for their conduct. Moreover, Plaintiffs state, their claim arising out of Defendants' adoption of the 1995 Plan is actually a claim for equitable relief. They claim they are entitled to the equitable relief of reinstatement as employees so that they will be eligible to participate in the 1995 Plan. To Plaintiffs, this entitlement arises as a consequence of the better benefits levels included in the 1995 Plan, "coupled with the fiduciary representations made by BN and the other fiduciaries in the 1991 SPD that: 'management has decided that if there are any additional plans, the benefits would not be as good as those contained in this plan.' "[15] Because this claim necessarily depends on finding an actionable misrepresentation by Defendants, Defendants are entitled to summary judgment on this claim.

### 3. *Denial of Benefits Under the 1995 Plan*

Finally, Plaintiffs contend in their pleadings that Defendants breached their fiduciary duties by denying them benefits under the 1995 Plan.[16] Defendants have moved for summary judgment on the ground that this

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[15] Plaintiffs' Response at p. 9.

[16] Complaint at p. 9.

type of claim is properly characterized as one for denial of benefits under section 502(a)(1)(B) of ERISA rather than a fiduciary duty claim brought pursuant to section 502(a)(3). The Fifth Circuit has concluded that when a beneficiary simply wants what was supposed to have been distributed under the plan, the appropriate remedy is a claim for denial of benefits under section 502(a)(1)(B) of ERISA rather than section 502(a)(3). *Corcoran v. United HealthCare, Inc.*, 965 F.2d 1321, 1335 (5th Cir.), *cert. denied*, 506 U.S. 1033, 113 S.Ct. 812, 121 L.Ed.2d 684 (1992), *citing Cathey v. Dow Chemical Co. Medical Care Program*, 907 F.2d 554, 555 (5th Cir.1990), *cert. denied*, 498 U.S. 1087, 111 S.Ct. 964, 112 L.Ed.2d 1051 (1991). Plaintiffs do not contest this point in their response, therefore the court will enter summary judgment in Defendants' favor on this portion of the breach of fiduciary duty claim. The substance of this claim will be analyzed as one for denial of benefits in violation of section 502(a)(1)(B).

### B. *Denial of Benefits Under the 1995 Plan*

Plaintiffs' Third Claim for Relief is brought pursuant to section 502(a)(1)(B) of ERISA. Plaintiffs assert that they are entitled to and have been wrongfully denied benefits under the 1995 Plan.[17] Section 502(a)(1)(B) allows plan participants to recover benefits due them under the terms of an ERISA plan. 29 U.S.C. § 1132(a)(1)(B). Defendants contend that summary judgment should be granted in their favor on this claim for two reasons. First, they argue that it was not an abuse of the plan administrator's

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[17] Complaint at pp. 11-12.

discretion to deny Plaintiffs' additional benefits as provided for in the 1995 Plan. Second, they maintain that Plaintiffs are not entitled to any additional severance benefits under the terms of either the 1991 or 1995 Plans.

Plaintiffs argue that under a "natural interpretation" of the 1991 Plan, they should receive the increased benefits included in the 1995 Plan. They contend that had they not been misled by the "no better benefits" language in the 1991 Q & A, they would have declined to retire in 1991 and continued working for BN up until the 1995 Plan was offered. In support of this argument they cite *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1221 (5th Cir.), *cert. denied*, 506 U.S. 820, 113 S.Ct. 68, 121 L.Ed.2d 35 (1992), wherein the Fifth Circuit held that employees who would not have retired but for the misconduct of the employer in concealing certain plan amendments would have standing to seek benefits under a later plan. Here, the "but for" causation element crucial to this theory is missing. There is no genuine issue of material fact whether BN spoke untruthfully in 1991 when it stated that later plans would not be better than the 1991 Plan. Plaintiffs are not entitled to 1995 Plan benefits because they are unable to raise a fact issue whether Defendants improperly induced them to retire by misleading them in the 1991 Q & A.

Next, Plaintiffs maintain that they are entitled to benefits under the 1995 Plan because they were contractually vested in the 1991 Plan, and the 1991 Plan terms contemplate that if a more advantageous plan were later offered they would be entitled to the benefit of that plan. Defendants respond that "[n]either the 1991 Plan SPD nor the Q & A states, 'if a plan with better benefits is enacted

four years from now, you will be entitled to receive those benefits.' "[18] In fact, the 1991 Plan says nothing about what would happen if this type of situation arose. At most, the 1991 Q & A conveyed BN's then-present state of mind regarding future plans. ERISA plan terms are to be construed according to their plain and ordinary meaning. *Wegner v. Standard Ins. Co.*, 129 F.3d 814, 818 (5th Cir.1997). Any ambiguities in the 1991 Plan or SPD must be construed against Defendants and in favor of Plaintiffs. *Ramsey v. Colonial Life Ins. Co.*, 12 F.3d 472, 479 (5th Cir.1994); *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 982 (5th Cir.1991).

Here there are no ambiguities in the 1991 Plan documents which would create confusion regarding any entitlement of 1991 Plan participants to enhanced severance benefits in the event that a future plan such as the 1995 Plan was adopted. The 1991 Plan documents are entirely silent regarding such an event, and thus make it clear that there was no promise or possibility of enhanced benefits being awarded to participants if a more generous plan were enacted later. Although Defendants are bound by clear and unambiguous statements in the plan documents, they are not bound to anything on which the plan documents are silent. "Contractual vesting is a narrow doctrine. To prevail, Plaintiffs must assert strong prohibitory or granting language; mere silence is not of itself abrogation." *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 938 (5th Cir.), *cert. denied*, 510 U.S. 870, 114 S.Ct. 196, 126 L.Ed.2d 154 (1993). Even when the language of the 1991 Plan and 1991 SPD is viewed in the light most favorable

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[18] Defendants' Motion at p. 17.

to Plaintiffs, Defendants are entitled to judgment as a matter of law on Plaintiffs' claim for denial of benefits under the 1995 Plan.

### C. *Estoppel*

Plaintiffs' next claim is brought under an estoppel theory.[19] This claim is based upon the same conduct as their fiduciary duty and denial of benefits claims. In support of this theory Plaintiffs rely on two cases that discuss the circumstances wherein representations in ERISA plan documents may or may not be binding on an employer or become contractually-vested rights of the plan participants. *See Wise*, 986 F.2d at 937-40; *Hansen*, 940 F.2d at 981-83. Neither of these cases involved an estoppel claim brought under state law; moreover, the Fifth Circuit has held that where a party seeks to recover benefits owed under the plan, state law estoppel claims are preempted by ERISA. *Transitional Hospitals Corp. v. Blue Cross and Blue Shield of Texas, Inc.*, 164 F.3d 952, 954 (5th Cir.1999). As is discussed at length above, ERISA's civil enforcement provision provides Plaintiffs with the remedy they seek. 29 U.S.C. § 1132. Plaintiffs' estoppel cause of action is not cognizable in this case; therefore, Defendants are entitled to summary judgment on Plaintiffs' Fourth Claim for Relief.

### D. *Fifth Claim for Relief*

In their Fifth Claim for Relief, Plaintiffs complain that "in contravention of the representations and assurances

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[19] Complaint at pp. 12-13.

set forth in the 1991 SPD, BN adopted the 1995 Plan which provides better benefits than those provided by the 1991 Plan."[20] Defendants argue that this claim merely recasts Plaintiffs' breach of fiduciary duty claim. Plaintiffs concede that this is an additional claim brought under a fiduciary duty theory.[21] This claim relies upon the same alleged inaccuracies in the 1991 SPD as Plaintiffs' earlier fiduciary duty claims. As discussed at length above, the fiduciary duty claims should be dismissed. For the same reasons, this claim should be dismissed as well.

### E. *Section 510 Claim*

Finally, Plaintiffs allege a claim for interference with the receipt of plan benefits in violation of ERISA section 510, 29 U.S.C. § 1140.[22] This claim is premised on their allegation that the 1991 SPD contained misrepresentations intentionally calculated to cause Plaintiffs to leave their employment, thus giving up compensation and benefits they otherwise would have earned had they continued working. Section 510 of ERISA prohibits employers from discharging employees for the purpose of interfering with their attainment of any right to which they are entitled under an employee benefit plan. 29 U.S.C. § 1140; *Perdue v. Burger King Corp.*, 7 F.3d 1251, 1255 (5th Cir.1993). Plaintiffs claim that Defendants' deceptive conduct caused them to resign when they would not have

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[20] *Id.* at p. 13.

[21] Plaintiffs' Response at p. 15.

[22] Complaint at pp. 14-15.

otherwise done so and therefore their resignations should not be considered voluntary.

Like Plaintiffs' other claims, the success of this claim depends upon a finding that Defendants misrepresented the truth when they made the disputed statements in the 1991 SPD. There is no genuine issue of material fact present in the record whether Defendants materially misrepresented present facts when they made those statements; therefore, Plaintiffs' section 510 claim fails as a matter of law. Defendants are entitled to summary judgment on all of Plaintiffs' claims.

### F. *BN's Counterclaim*

In addition to moving for summary judgment on Plaintiffs' claims, BN has moved for summary judgment on its counterclaim against Plaintiffs for attorneys' fees. When Plaintiffs separated from their employment in 1991, they each signed documents releasing BN from any and all claims or causes of action, including those arising under ERISA. BN claims that it is entitled to its attorneys' fees because Plaintiffs breached their releases by filing this lawsuit.

The releases signed by Plaintiffs in 1991 do not apply to claims which have yet to arise. The alleged misrepresentations; however, were made back in 1991, prior to the signing of the release. Arguably, however, Plaintiffs' claims did not arise (or at least they were not aware of them) until 1995 when BN enacted the 1995 Plan. The court declines to award BN its attorneys' fees, denies this portion of Defendants' Motion for Summary Judgment, and dismisses BN's counterclaim.

## III. *Plaintiffs' Motion for Summary Judgment*

Plaintiffs have also filed a motion for summary judgment requesting summary judgment on liability for each of their claims against Defendants. In light of the court's ruling on Defendants' Motion for Summary Judgment, this motion is denied.

## IV. *Conclusion*

Summary judgment is **granted** for Defendants on all of Plaintiffs' claims, and all of Plaintiffs' claims are hereby dismissed with prejudice. With respect to BN's counterclaim for attorneys' fees, Defendants' summary judgment motion is **denied**, and BN's counterclaim is dismissed with prejudice. Plaintiffs' Motion for Summary Judgment on Liability is **denied**. Judgment will be entered by separate document.

**SO ORDERED.**

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 99-11147

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(Filed Mar 12, 2001)

JAMES D MCCALL; ET AL

Plaintiffs

JAMES D MCCALL; STANLEY R COLLINS; E E BOWMAN; J WILLIAM HUFF; MICHAEL N DANA; O J NORMAN; MURL C LINKE; JOSEPH R ROBERTS; LAWRENCE S KISER; NORMAN D BREHM; WILLIAM S BRANCH; JEROME P O'CONNER; WILLIAM T DAVIDSON; BART A WIESLEY; W H TICEN; BETTY TITCHENER, executrix of Gerald Titchener's estate; GEORGE D STARIHA

Plaintiffs-Appellants

v.

BURLINGTON NORTHERN/SANTE FE COMPANY, formerly known as Burlington Northern Railroad Co; BURLINGTON NORTHERN RAILROAD COMPANY 1991 SEPARATION PAY PLAN; TRUSTEES OF THE BURLINGTON NORTHERN RAILROAD COMPANY 1991 SEPARATION PAY PLAN; TRUSTEES OF THE BURLINGTON NORTHERN RAILROAD COMPANY 1995 VOLUNTARY SEPARATION PLAN; BURLINGTON NORTHERN INC PENSION PLAN; TRUSTEES OF THE BURLINGTON NORTHERN INC PENSION PLAN; BURLINGTON NORTHERN THRIFT AND PROFIT SHARING PLAN; TRUSTEES OF THE

BURLINGTON NORTHERN THRIFT AND PROFIT SHARING PLAN; ALAN W SPEAKER; JEANNE MICHALSKI; DONALD SCOTT

Defendants-Appellees

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Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING EN BANC

(Opinion 12/26/00, 5 Cir., ___, ___ F.3d ___)

Before KING, Chief Judge, PARKER, Circuit Judge, and KAZEN*, District Judge.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

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* District Judge of the Southern District of Texas, sitting by designation.

ENTERED FOR THE COURT:

/s/ Robert M. Parker
United States Circuit Judge

No. 00-1845

In The

# Supreme Court of the United States

JAMES D. McCALL; STANLEY R. COLLINS; E.E. BOWMAN; J. WILLIAM HUFF; MICHAEL N. DANA; O. J. NORMAN; MURL C. LINKE; JOSEPH R. ROBERTS; LAWRENCE S. KISER; NORMAN D. BREHM; WILLIAM S. BRANCH; JEROME P. O'CONNOR; WILLIAM T. DAVIDSON; BART A. WIESLEY; W. H. TICEN; BETTY TITCHENER, executrix of Gerald Titchener's estate; and GEORGE D. STARIHA,

*Petitioners,*

v.

BURLINGTON NORTHERN/SANTA FE COMPANY f/k/a Burlington Northern Railroad Co.; BURLINGTON NORTHERN RAILROAD COMPANY 1991 SEPARATION PAY PLAN; TRUSTEES OF THE BURLINGTON NORTHERN RAILROAD COMPANY 1991 SEPARATION PAY PLAN; TRUSTEES OF THE BURLINGTON NORTHERN RAILROAD COMPANY 1995 VOLUNTARY SEPARATION PAY PLAN; BURLINGTON NORTHERN, INC. PENSION PLAN; TRUSTEES OF THE BURLINGTON NORTHERN, INC. PENSION PLAN; BURLINGTON NORTHERN THRIFT AND PROFIT SHARING PLAN; TRUSTEES OF THE BURLINGTON NORTHERN THRIFT AND PROFIT SHARING PLAN; ALAN W. SPEAKER; JEANNE MICHALSKI; and DONALD SCOTT,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

STEPHEN F. FINK
*Counsel of Record*
THOMPSON & KNIGHT L.L.P.
1700 Pacific Avenue,
Suite 3300
Dallas, Texas 75201
214/969-1700

CHARLES W. SHEWMAKE
LAWRENCE M. STROIK
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, INC.
3017 Lou Menk Drive
Fort Worth, Texas 76131-2830
817/352-2358
*Counsel for Respondents*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

20 pp

## QUESTION PRESENTED

Does a fiduciary breach its fiduciary duties under ERISA by truthfully apprising employee benefit plan participants about management's intent regarding future benefit plans?

## LIST OF PARTIES

The caption of the case includes the names of all parties.

Respondent The Burlington Northern and Santa Fe Railway Company, formerly known as Burlington Northern Railroad Co., is a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation.

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FEDERAL STATUTES

**Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq*** ..... ***passim***

## RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for writ of certiorari. The lower courts held that respondents breached no fiduciary duties under ERISA by truthfully apprising employee benefit plan participants about management's intent regarding future benefit plans. That holding is squarely in accord with Supreme Court and court of appeals precedent and therefore creates no conflict among the circuits.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 237 F.3d 506 and is reprinted at page 1 of the Appendix to the Petition for Writ of Certiorari. The order denying petitioners' petition for rehearing en banc is reported in table form at 252 F.3d 437 and reproduced in the Appendix at page 38.

The decision of the United States District Court for the Northern District of Texas is reported at 61 F. Supp.2d 563 and is reprinted at page 17 of the Appendix.

## STATEMENT OF THE CASE

In 1991, due to a severe and lengthy economic recession and competition from other carriers, the management of respondent Burlington Northern Railroad Company ("BN") concluded that the company needed to

reduce its expenses significantly. *Appendix ("App.")* 18.[1] BN first attempted to decrease overall costs without reducing the number of employees. *Id.* at 2. Management later concluded, however, that if expenses were to be reduced to an acceptable level, a reduction in the company's workforce was unavoidable.

Donald W. Scott, BN's Senior Vice President of Human Resources, was the senior executive officer at BN charged with the creation, design, and implementation of a method for reducing the workforce. *Id.* The goal was to reduce the number of employees by 500. *Id.* Scott briefed BN's Chief Executive Officer and other senior officers of the company on the various methods by which employment expenses could be reduced. After considering whether simply to lay off employees or to offer a program of severance benefits to encourage employees to resign, Scott decided to attempt to reduce the workforce to its targeted level through a voluntary separation pay plan. That concept became the 1991 Separation Pay Plan (the "1991 Plan"). *Id.* at 2-3.

In Scott's prior experience with voluntary separation pay plans at BN, employees often seemed unwilling to take advantage of the plans because they assumed that there might be another, more generous pay plan adopted in the near future. *Id.* at 3. Unfortunately, some of those employees became subject to involuntary lay off because of their unfounded assumptions. Scott recommended adopting a plan that would be as generous as possible in

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[1] This brief will also refer to respondents collectively as "BN."

the hope that it would accomplish the targeted voluntary workforce reduction through voluntary, as opposed to involuntary, means. *Id.* at 28. If the 1991 Plan did not achieve the workforce reduction goals, BN would strongly consider further reduction by involuntary layoffs, but not by another voluntary plan with better benefits than those contained in the 1991 Plan. Other BN managers concurred with this proposal.

Scott also had the overall responsibility for drafting the summary plan description ("SPD") for the 1991 Plan. He decided to include with that SPD a series of questions and answers designed to answer common employee questions that he anticipated might be asked about the 1991 Plan. One of the questions and answers (the "1991 Q & A") was the following:

> Q: Will there be another opportunity to participate in a separation pay plan after this one?
>
> A: The company is offering this plan in an effort to reduce its expenses due to business conditions. At this time, the company's management has not decided whether there will be any additional voluntary separation plans. However, management has decided that if there are any additional plans, the benefits would not be as good as those contained in this plan.

*Id.* at 3. The answer quoted above was true. *Id.* at 6.

Each of the petitioners was employed by BN in 1991 and voluntarily elected to participate in the 1991 Plan.[2] *Id.* at 3. Each petitioner received all the benefits under the 1991 Plan as described in that Plan, and most of them have been receiving retirement benefits provided by BN since that time.

Unfortunately, the number of employees who elected to participate voluntarily in the 1991 Plan fell short of the goal of reducing the workforce by 500 people. True to its word, BN did not institute another voluntary separation pay plan. Instead, BN instituted an involuntary layoff to achieve the necessary reductions. The benefits laid-off employees received were less than those offered in the 1991 Plan.

Some four years later, under a new management team and in response to two new events, BN adopted the 1995 Voluntary Separation Pay Plan (the "1995 Plan"). *Id.* at 3-4. This plan was instituted as a result of an "activity value analysis" of BN conducted by an outside consultant. The consultant concluded that BN could do the same amount of work with fewer number of people in its employ if certain organizational changes were made. *Id.* at 19. In addition, BN at the time was in the process of merging with the Atchison, Topeka, and Santa Fe Railway, and BN determined that the merged company (The Burlington Northern and Santa Fe Railway Company) would require fewer employees than the total number

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[2] The petition says petitioners relied on the 1991 Q & A in deciding to participate in the 1991 Plan. *Petition* at 5. Petitioners' alleged reliance is disputed, however, and neither the district court nor the court of appeals addressed that issue.

that were then currently employed collectively by both companies. Neither of these events was even foreseen in 1991, much less a factor in the decision to offer the 1991 Plan. The merger, for example, was not proposed until 1994 and not approved by the regulatory authorities until 1995.

Some four years into their retirement, upon learning of the 1995 Plan three of the petitioners brought claims for benefits under the 1995 Plan. Their claims were denied by the plan on the grounds that they had received all the benefits they were entitled to under the 1991 Plan, and they were not eligible to participate in the 1995 Plan because they were not active employees when that plan was offered. *Id.* at 19.

Petitioners brought suit in the United States District Court for the Northern District of Texas under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, asserting claims for breach of fiduciary duty, wrongful denial of benefits, estoppel, and interference with plan benefits. The district court entered summary judgment for BN. The United States Court of Appeals for the Fifth Circuit affirmed finding, among other things, that the 1991 Q & A was true. District Judge Kazen, sitting by designation, dissented on the grounds that he believed that there was a genuine issue of fact precluding summary judgment. A petition for rehearing en banc was denied because no member of the panel or judge in the Fifth Circuit requested that the court be polled for rehearing en banc.

## SUMMARY OF THE ARGUMENT

In an attempt to obtain certiorari review, petitioners say that the Fifth Circuit's opinion in this case "is contrary to the decisions of every circuit (including the Fifth Circuit) that have addressed the binding nature of statements made in a summary plan description." *Petition* at 9. They also suggest that the Fifth Circuit refused to grant a remedy for a violation of ERISA. Petitioners' portrayal of the Fifth Circuit's decision, however, simply ignores the grounds for the court of appeals' decision. This case turns not on any disputed legal principle, but on Supreme Court precedent and a single, undisputed fact: the 1991 Q & A was true.

## ARGUMENT

### A. BN breached no fiduciary duty in denying petitioners' claims for benefits under the 1995 Plan or in drafting or distributing the 1991 Q & A.

Section 502(a) of ERISA, 29 U.S.C. § 1132(a), has "six carefully integrated civil enforcement provisions," *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985), that were crafted with "deliberate care." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). Thus, the Court has admonished courts not to "tamper with an enforcement scheme crafted with such evident care." *Russell*, 473 U.S. at 147. Any meaningful analysis of petitioners' arguments in their petition, therefore, must begin – as the district court's and the court of appeals' did – by identifying the civil enforcement provisions of ERISA petitioners

seek to invoke and the actions of BN that petitioners say violated the law.

The petition alludes only to petitioners' claim for breach of fiduciary duty under section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). Evidently, therefore, they do not believe that their other claims, including their claim to recover benefits under the terms of the plan under section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), merit review by the Court. The two actions petitioners say constituted breaches of fiduciary duty are: (1) the denial of their request for "better" benefits under the 1995 Plan; and (2) the drafting or distribution of the 1991 Q & A.[3]

The petition simply ignores the Fifth Circuit's ground for ruling against petitioners on the former claim. The court of appeals disposed of that claim on the ground that where a participant seeks to recover benefits that he claims he was entitled to receive under an employee benefit plan, the claim is cognizable as a claim to recover benefits under section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), not as one for breach of fiduciary duty under section 502(a)(3). *App.* at 7-8. The Fifth Circuit's conclusion was compelled by the Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). There, in recognizing a cause of action under section 502(a)(3) to recover

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[3] Before the district court and the court of appeals, petitioners also argued that BN breached its fiduciary duties by adopting the 1995 Plan. They do not appear to make this argument in their petition, presumably because, as the Fifth Circuit found, *App.* at 7, an employer acts as a settlor, not as a fiduciary, in adopting, amending, or terminating an employee benefit plan. *Lockheed Corp. v. Spink*, 517 U.S. 882, 889-90 (1996).

"appropriate equitable relief" for breach of fiduciary duty, the Court emphasized that it was not thereby allowing a beneficiary to "repackage his or her 'denial of benefits' claim as a claim for 'breach of fiduciary duty.' " *Id.* at 513. This is so, the Court said, because "Congress elsewhere provided equitable relief" so further equitable relief would not be "appropriate." *Id.* at 515. Not surprisingly, then, there is no conflict among the circuits on this issue; the cases are in accord that a plaintiff may not disguise a section 502(a)(1)(B) claim in "fiduciary clothing." *See Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474-75 (9th Cir.), *cert. denied*, 522 U.S. 996 (1997); *Coyne & Delany Co. v. Blue Cross & Blue Shield of Va., Inc.*, 102 F.3d 712, 713 (4th Cir. 1996); *Wald v. Southwestern Bell Corp. Customcare Medical Plan*, 83 F.3d 1002, 1006 (8th Cir. 1996); *Corcoran v. United Health Care, Inc.*, 965 F.2d 1321, 1335 (5th Cir.), *cert. denied*, 506 U.S. 1033 (1992). Thus, petitioners' meritless claim that BN breached its fiduciary duties by denying their claim for benefits plainly does not merit certiorari review.

The law that applies to petitioners' other claim also is clear, at least insofar as it applies here. Petitioners claim that BN breached its fiduciary duty by drafting or distributing the 1991 Q & A because the 1991 Q & A was not "accurate."[4] *Petition* at 16. Evidently petitioners believe

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[4] Petitioners also say "[t]he evidence shows both that BN did not investigate the accuracy of its statements at the time it included them in the 1991 SPD, nor did it ensure that the statements were in fact accurate." *Petition* at 16. Petitioners do not explain what sort of "investigation" could or should have been conducted or what facts it would have discovered. In any event, if, as both courts below found, the 1991 Q & A was true,

that BN breached its fiduciary duty because the statement could be misconstrued as a promise that BN would never, until the end of time, under any circumstances offer a severance pay plan with better benefits than those provided in the 1991 Plan. In any event, eight courts of appeals have addressed the question of the proper analysis of a claim that a fiduciary made misleading (or even false) statements about possible future employee benefits. Seven of them have come to the same conclusion: there can be no breach of fiduciary duty in making representations about a future plan until and unless that plan has been under "serious consideration." *See Bins v. Exxon Co. U.S.A.*, 220 F.3d 1042, 1049 (9th Cir. 2000) (en banc); *Vartanian v. Monsanto Co.*, 131 F.3d 264 (1st Cir. 1997); *Hockett v. Sun Co.*, 109 F.3d 1515, 1522 (10th Cir. 1997); *Muse v. IBM Corp.*, 103 F.3d 490, 493 (6th Cir. 1996), *cert. denied*, 520 U.S. 1240 (1997); *Fischer v. Philadelphia Elec. Co.*, 96 F.3d 1533 (3d Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997) ("*Fischer II*"); *Wilson v. Southwestern Bell Tel. Co.*, 55 F.3d 399, 405 (8th Cir. 1995); *Barnes v. Lacy*, 923 F.2d 539, 544 (11th Cir.), *cert. denied*, 502 U.S. 938 (1991). This test balances the tension between an employee's right to information and an employer's need to operate on a day-to-day basis. *Fischer II*, 96 F.3d at 1539. It embodies the notion that "an employer should not be forever deterred from giving its employees a better deal merely because it did not clearly indicate to a previous employee that a better deal might one day be proposed." *Swinney v. General Motors Corp.*, 46 F.3d 512, 520 (6th Cir. 1995). And it

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then there was nothing further to investigate and no result of any further investigation would have changed the 1991 Q & A.

recognizes that employers do not have a " 'duty of clairvoyance,' *i.e.*, to predict accurately the future availability of benefits." *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988).

One court has taken a slightly different approach, although any differences between the approaches are inconsequential here. In *Ballone v. Eastman Kodak Co.*, 109 F.3d 117 (2d Cir. 1997), the Second Circuit concluded that "serious consideration" of a change is not necessarily a prerequisite to a finding of breach of fiduciary duty regarding statements about plan changes. *Id.* at 123. Instead, the court concluded that statements are actionable if they are (i) material (ii) affirmative (iii) misrepresentations about present facts. *Id.* at 122. Whether a change is under serious consideration, the court concluded, is one factor affecting materiality. *Id.* at 123. But the court acknowledged that mere mispredictions are not actionable. Rather, only false statements about future benefits *couched as a guarantee* can be a breach of fiduciary duty. *Id.* at 125.

Any differences between *Ballone* and the "serious consideration" standards are immaterial here because BN prevails under both. The district court expressly so found. *App.* at 23-29. The Fifth Circuit effectively did so as well. As the court of appeals said, it is undisputed "that the 1995 Plan was not conceived until several years after [petitioners] made their decision to retire." *App.* at 5-6. Thus, BN breached no fiduciary duty under the "serious consideration" test. The Fifth Circuit also found, on the undisputed facts, that the 1991 Q & A was true. Thus, BN breached no fiduciary duty under *Ballone* by misrepresenting material present facts. Certiorari review

of petitioners' claim that BN breached its fiduciary duties in drafting or distributing the 1991 Q & A therefore also is unwarranted.

### B. The decision of the Fifth Circuit creates no conflict among the circuits.

Ignoring the dispositive lines of authority, petitioners repeatedly say that the court of appeals' opinion in this case conflicts with a number of cases holding that statements in summary plan descriptions are "binding." The argument is a curious one given that the Fifth Circuit's opinion *explicitly reaffirms* the principle that petitioners say it repudiated – it says that "the SPD is binding and if there is a conflict between the SPD and the terms of the plan itself, the SPD controls." *App.* at 9.

In any event, the principle has nothing to do with the fiduciary duty claims raised in the petition. All of the cases that petitioners say support their central theory – *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1515 (10th Cir. 1996); *Aiken v. Policy Mgmt. Sys. Corp.*, 13 F.3d 138, 141 (4th Cir. 1993); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 938 (5th Cir.), *cert. denied*, 510 U.S. 870 (1993); *Hansen v. Continental Ins. Co.*, 940 F.2d 971 (5th Cir. 1991); *Heidgerd v. Olin Corp.*, 906 F.2d 903, 908 (2d Cir. 1990); *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988); and *McKnight v. Southern Life and Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985) – involved claims to recover benefits under section 502(a)(1)(B) and merely stand for the proposition that in such an action, where a participant is entitled to a benefit under the terms of a summary plan description but not under the terms of the

plan document itself, the terms of the summary plan description control. The reason courts have adopted the rule is clear: where a plan has both a formal plan document and a summary plan description, only the latter typically is distributed to participants. *See* 29 U.S.C. §§ 1022(a), 1024(b) (requiring that summary plan descriptions be distributed). Thus, it would be unfair for the plan to deny a claim for benefits based on an undisclosed provision in the plan document that contradicts a provision in the summary. *See, e.g., Hansen*, 940 F.2d at 982-83.

These principles do not apply here. The claim petitioners say merits certiorari review is a claim for breach of fiduciary duty, not one to recover benefits. This case involves only one document, not two, and that document was distributed to participants. BN does not claim that petitioners are not entitled to benefits based on the language of some undisclosed document. In other words, the principle that a summary plan description is "binding" simply does not answer the question here: whether BN, by making the statement in the 1991 Q & A, breached its fiduciary duties under ERISA.

### C. Petitioners are entitled to no remedy because there was no violation of ERISA.

In part III of the petition petitioners suggest that the Fifth Circuit found that BN "breached" the 1991 Q & A but held that ERISA provides no remedy for the breach. Petitioners say that, as "appropriate equitable relief" under section 502(a)(3) of ERISA, the court should have awarded them not only the "better" benefits under the 1995 Plan, but also reinstatement from 1991 to 1995 and

all attendant back pay and benefits. Once again, however, petitioners ignore the basis of the Fifth Circuit's ruling and confuse ERISA's different civil enforcement provisions.

The portion of the court of appeals' opinion on which petitioners base their argument is the court's discussion of petitioners' claim under section 502(a)(1)(B) of ERISA, not their claim for breach of fiduciary duty. A claim under section 502(a)(1)(B) is "to recover benefits . . . *under the terms* of [the] plan." 29 U.S.C. § 1132(a)(1)(B) (emphasis added). Generally, a claim under that section is reviewed the same as any other contract claim: by looking to the terms of the plan and other manifestations of the parties' intent. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 112-13 (1989). The court of appeals did not uphold summary judgment on petitioners' section 502(a)(1)(B) claim on the grounds that ERISA fails to provide a remedy for a violation of the statute. Instead, the Fifth Circuit concluded that that claim was meritless because the 1991 Q & A simply does not say what petitioners wish it said. It does not say "if there are ever any plans with benefits better than the current plan, you will be entitled to benefits under that plan." *App.* at 9-10. The Fifth Circuit merely construed the 1991 Q & A to mean what it says.

Indeed, although petitioners assert that "the Fifth Circuit should have strictly held BN to the terms of [its] promise" not to provide better benefits in the future, *Petition* at 12, if the court had done so it would have prohibited BN from adopting the 1995 Plan, not required BN to reinstate petitioners and give them better benefits. In other words, the 1991 Q & A was simply a truthful

statement of BN's intent at the time about future benefit plans, not a promise of benefits. Such truthful statements, the courts of appeals agree, do not violate ERISA. *See, e.g., Taylor v. Peoples Natural Gas Co.*, 49 F.3d 982, 990 (3d Cir. 1995); *Barnes v. Lacy*, 923 F.2d at 543-44.

## CONCLUSION

The court of appeals' opinion in this case creates no conflict among the circuits. Judgment for respondents on petitioners' breach of fiduciary duty claims was dictated by precedent of the Court and under the standards adopted by the courts of appeals. The petition for writ of certiorari should be denied.

Respectfully submitted,

THOMPSON & KNIGHT L.L.P.
STEPHEN F. FINK
1700 Pacific Avenue
Suite 3300
Dallas, Texas 75201
(214) 969-1700

CHARLES W. SHEWMAKE
LAWRENCE M. STROIK
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
3017 Lou Menk Drive
Fort Worth, Texas 76131-2830
(817) 351-2358

*Counsel for Respondents*